PRESS METAL SARAWAK SDN BHD v. ETIQA TAKAFUL BHD

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP FCJ
ZAINUN ALI FCJ
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
[CIVIL APPEAL NO: 02(I)-27-04-2015(W)]
15 AUGUST 2016

ARBITRATION: *Arbitrator – Jurisdiction – Challenge as to jurisdiction – Whether must be made during arbitration proceedings – Whether arbitrator has jurisdiction to deal with all matters specified in plaintiff's claim – Whether issue of amount or quantum of indemnity within arbitrator's jurisdiction*

ARBITRATION: *Jurisdiction – Stay of proceedings – Application under s. 10(1) of Arbitration Act 2005 – Requirements – Whether there was binding arbitration agreement between parties*

ARBITRATION: *Stay of proceedings – Principles applicable – Application under s. 10(1) of Arbitration Act 2005 – Requirements – Whether there was binding arbitration agreement between parties – Whether stay mandatory if all requirements under s. 10(1) fulfilled – Whether reference to document containing arbitration clause shall constitute an arbitration agreement – Whether dispute fell within arbitration clause*

CIVIL PROCEDURE: *Stay of proceedings – Arbitration – Principles applicable – Application under s. 10(1) of Arbitration Act 2005 – Whether there was binding arbitration agreement between parties – Whether stay mandatory if all requirements under s. 10(1) fulfilled – Whether reference to document containing arbitration clause shall constitute an arbitration agreement – Whether dispute fell within arbitration clause – Whether stay ought to be granted*

This appeal was against the decision of the Court of Appeal ('COA') in dismissing the plaintiff's appeal relating to the decision of the High Court, whereby the High Court Judge granted a stay of proceedings pending referral of the dispute to arbitration, based on an application made by the defendant pursuant to s. 10 of the Arbitration Act 2005 ('the 2005 Act'). The plaintiff owned and operated an aluminium smelting plant at the business address ('Mukah plant') whilst the defendant was in the business of providing insurance and takaful products. By a contract of insurance, evidenced by a placement slip ('placement slip') and a policy certificate, the defendant agreed with the plaintiff to insure all critical plants and machineries and loss of profits ('loss of profits') against sudden and unforeseen damages. Subsequently, when the State of Sarawak was affected by a wide power outage which caused disruption to the plaintiff's smelting operation and

forced a temporary shutdown of the Mukah plant, the plaintiff suffered substantial losses and damage. The plaintiff notified the defendant of the incident and later indicated to the defendant's appointed loss adjusters that its estimated indemnifiable losses were in the region of RM125 million. In the meantime, while adjustment was taking place, the plaintiff applied for an interim payment of RM15 million for machinery breakdown. The defendant, *vide* a letter dated 15 November 2013, disclaimed payment of the plaintiff's claim for machinery breakdown and payment in respect of the plaintiff's claim for loss of profits by relying on various exclusion clauses contained in the insurance policy. The defendant estimated that based on their analysis, the amount of indemnity provided by the policy was to be approximately RM3.7 million, not RM125 million as claimed by the plaintiff. On the same date, the defendant issued a notice of arbitration pursuant to cl. 4.7 in s. 1 of the policy in respect of machinery breakdown and cl. 4.11 in s. 11 in respect of loss of profits. The plaintiff was not agreeable to refer the matter to arbitration and therefore, commenced legal proceedings at the High Court against the defendant claiming, *inter alia*, for an indemnity by the defendant under the policy in respect of all losses and damage suffered by the plaintiff arising out of the incident and also for various declaratory orders and damages for breach of the policy and/or fraud committed by the defendant in the issuance of the policy. The defendant filed its memorandum of appearance and also a notice of application to stay all proceedings relating to the suit filed by the plaintiff and to refer the same to arbitration pursuant to s. 10(1) of the 2005 Act and/or pursuant to the inherent jurisdiction of the court. The defendant relied on two arbitration clauses - namely cl. 4.7 and cl. 4.11 of the policy certificate ('the arbitration clauses'). The defendant admitted liability to indemnify the plaintiff for certain losses arising from the power outage and as such the sole difference or dispute between the parties was in relation to the amount or quantum of indemnity to be paid to the plaintiff under the policy and therefore the respective arbitration clauses applied and the defendant was entitled to refer the dispute to arbitration. The High Court Judge allowed the application and the decision was subsequently upheld by the Court of Appeal. Hence, the present appeal. The leave to appeal was granted on the question of whether a court may grant a stay of all proceedings under s. 10(1) of the 2005 Act where only part of the matter in issue falls strictly within the ambit of the arbitration clause and another part does not.

Held (dismissing appeal with costs; affirming decisions of High Court and Court of Appeal)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) In order to grant a stay order under s. 10(1)(after the 2011 Amendment), the court has to consider whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being

performed. The question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). The clear effect of the present s. 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled. (paras 32 & 33)

(2) A challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself, and not at the court hearing an application for a stay under s. 10(1). The arbitrator has jurisdiction to deal with all the matters specified in the plaintiff's claim which included the issue of amount or quantum of indemnity to be paid, which may also involve issues of liability and coverage, and other ancillary matters such as declaratory orders, damages for breach of the policy and fraud committed by the defendant in respect of the issuance of the policy. (paras 40 & 113)

(3) The parties are bound by the terms of the arbitration agreement which they had voluntarily executed which includes reference to another document where the terms can be found. The HCJ found that the expired Jerneh Policy contained an arbitration clause which was effectively incorporated in the latter policies by the reference made in the placement slip, and that it was the intention of the parties to refer any disputes to arbitration as per the terms and conditions of the expiring Jerneh Policies. These findings were consistent with the provisions of s. 9 of the 2005 Act, particularly sub-s. (5) which clearly provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement; and the agreement is in writing and the reference is such as to make that clause part of the agreement. There was no reason to disturb the findings. (paras 49-51 & 53)

(4) An arbitration agreement or clause is a written submission, agreed to by the parties, and like other written submissions, must be construed according to its language and in light of the circumstances in which it is made. Whether a dispute falls within an arbitration clause must depend on (i) what is the dispute or difference between the parties; and (ii) what disputes the arbitration clause covers. An applicant for a stay under s. 10(1) of the 2005 Act must therefore establish that the matters in question are within the scope of the arbitration submission. (paras 55-57)

(5) The existence of a valid arbitration clause in an agreement between the parties does not automatically make it operative; the arbitration clause will only be operative when the given dispute or difference falls within the ambit of the arbitration clause. There exist valid arbitration clauses between the parties and the defendant, as an insurer, had effectively admitted liability to indemnify the plaintiff, as the insured,

leaving only the issue of amount or quantum to be determined, thus triggering the clauses. There was nothing to show that the agreement between the parties was null and void, inapplicable, inoperative or incapable of being performed. Liability which had been effectively admitted by the defendant triggered the arbitration clauses which bind the parties. (paras 64, 69 & 112)

(6) An arbitration clause, like any other written agreement, must be construed according to its language and in light of the circumstances in which it is made. The exclusions relating to the question of amount or quantum of indemnity, relate to the interpretation of the terms of the policy certificate, on what items are 'to be included' and what are 'to be excluded' in the coverage based on submissions and documents adduced by the insured. Therefore, the claims by the plaintiff, whether 'included or excluded' by the defendant, were matters within the ambit of the arbitration clauses between the parties. (paras 70 & 80)

(7) Whether a particular difference or dispute falls within an agreement to arbitrate depends primarily on the proper construction of that agreement. The court should lean more towards granting a stay pending arbitration under s. 10(1) of the 2005 Act, even in cases where the court is in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the ambit of the arbitration clause. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit, to the commercial purpose of the arbitration clause. (paras 88, 91 & 93)

(8) The defendant was 'the party accused of fraud', while the plaintiff was 'the party alleging fraud'. The defendant, by filing its application, wanted the matter to proceed to arbitration; while the plaintiff opposed the application. However, under s. 10 of the 2005 Act, it is mandatory for the court to make such a stay order once the requirements in the section are fulfilled. The court herein had no discretion but to grant stay as applied for by the defendant 'as the party accused of fraud'. Ancillary matters such as fraud, damages, an account of monies received and inquiry as to the balance of monies remaining in the defendant's hand were not sufficient basis to deny a stay of proceedings pending arbitration. (paras 98 & 101)

(9) The issues in the present case involved questions of facts and the determination of questions of law depended on the determination of the related facts. Therefore, the plaintiff's argument that 'in the event of a conflict where areas of law are in dispute, the court would be a better forum to adjudicate the matter, notwithstanding the powers or

scope of arbitration in general' had no merit and was insufficient to refuse the stay application. Further, the issue of time, costs or expenses should not be cited to refuse a stay application. The expense of arbitration proceedings is also an insufficient ground for refusing a stay. (paras 102-104)

(10) A stay of proceedings is a stay of proceedings which have already been filed in court. Thus, an application for a stay of proceedings can only be filed by the defendant after the plaintiff had commenced proceedings in court, but before the defendant takes any other steps in the proceedings. In the circumstances, the plaintiff's argument that even if there were arbitration clauses binding on both parties, the clauses read together with cl. 4.9 of the policy allowed the plaintiff to proceed to court when the defendant disclaimed liability, did not in any way help the plaintiff in its case. (paras 106 & 107)

(11) Order 69 r. 10(3) of the Rules of Court 2012 ('ROC 2012') being a procedural subsidiary legislation, can only be interpreted in a manner which is not inconsistent with the mandatory provisions of s. 10(1) of the 2005 Act. The mandatory provisions of s. 10(1) of the 2005 Act must prevail and the matter ought to be stayed pending arbitration if all the necessary requirements under the section are fulfilled. Hence, the plaintiff's argument that O. 69 r. 10(3) of the ROC 2012 appears to suggest that it is the court that ought to decide whether the subject matter fell within the terms of the arbitration clause did not hold water. (paras 109 & 110)

(12) The COA had wrongly cited para. (b) of s. 10(1) of the 2005 Act which has been completely repealed by the 2011 Amendment. The repealed para. (b) was an exception to the mandatory rule of s. 10(1) whereby the effect is that court shall not make any order to stay the proceedings if '(b) there is in fact no dispute between the parties with regard to the matters to be referred'. With the deletion of the said para. (b), the court shall grant an order for stay whether there exists any dispute between the parties or not. In any event, the error by the COA did not have any effect on its decision. (para 111)

(13) The defendant's application for a stay of proceedings had fulfilled all the requirements under s. 10(1) of the 2005 Act. The HC and the COA were correct in granting the stay pending arbitration and there was no valid reason to disturb the concurrent decisions. In view of findings that all the matters as claimed by the plaintiff in its statement of claim were within the scope or ambit of the arbitration clauses in the policy certificate, it was unnecessary to answer the question of law on which the leave to appeal was granted. (paras 114 &115)

***Bahasa Malaysia** Headnotes*

Rayuan ini adalah terhadap keputusan Mahkamah Rayuan ('MR') yang menolak rayuan plaintif berkenaan keputusan Mahkamah Tinggi, di mana Hakim Mahkamah Tinggi membenarkan penangguhan prosiding sementara menunggu rujukan merujuk pertikaian kepada timbang tara berdasarkan permohonan yang dibuat oleh defendan menurut s. 10 Akta Timbang Tara 2005 ('Akta 2005'). Plaintif memiliki dan mengendali sebuah kilang peleburan aluminium di alamat perniagaan ('loji Mukah') manakala defendan dalam perniagaan menyediakan produk insurans dan takaful. Mengikut kontrak insurans yang dibuktikan melalui slip penempatan ('slip penempatan') dan sijil polisi, defendan bersetuju dengan plaintif untuk menginsuranskan segala loji, jentera dan kehilangan keuntungan ('kehilangan keuntungan') terhadap kerosakan yang tidak disangka. Kemudiannya, apabila negeri Sarawak terjejas oleh gangguan kuasa dengan teruk sekaligus menyebabkan gangguan kepada operasi peleburan plaintif yang memaksa penutupan sementara loji Mukah, plaintif mengalami kerugian dan kerosakan yang teruk. Plaintif memaklumkan kepada defendan kejadian tersebut dan kemudiannya memaklumkan kepada adjuster kerugian yang dilantik oleh defendan bahawa ganti rugi dianggarkan dalam lingkungan RM125 juta. Sementara itu, ketika penyelarasan dilakukan, plaintif memohon bayaran interim sebanyak RM15 juta untuk kerosakan jentera. Defendan, melalui surat bertarikh 15 November 2013, menafikan pembayaran tuntutan kerosakan jentera dan bayaran berkaitan tuntutan kehilangan keuntungan plaintif dengan bergantung kepada pelbagai klausa pengecualian yang terangkum dalam polisi insurans. Defendan menganggarkan bahawa berdasarkan analisis mereka, jumlah ganti rugi yang diperuntukkan oleh polisi adalah sekitar RM3.7 juta bukan RM125 juta sepertimana didakwa oleh plaintif. Pada masa yang sama, defendan mengeluarkan notis timbang tara menurut kl. 4.7 dalam s. 1 polisi mengenai kerosakan jentera dan kl. 4.11 dalam s. 11 berkenaan kehilangan keuntungan. Plaintif tidak bersetuju untuk merujuk perkara tersebut ke timbang tara dan oleh itu memulakan prosiding undang-undang di Mahkamah Tinggi terhadap defendan dengan menuntut, antara lain, tanggung rugi oleh defendan di bawah polisi berkaitan kerugian dan kerosakan yang dialami oleh plaintif berbangkit daripada kejadian tersebut dan juga untuk pelbagai perintah deklarasi dan ganti rugi untuk kemungkiran polisi dan/atau penipuan yang dilakukan oleh defendan dalam mengeluarkan polisi tersebut. Defendan memfailkan memorandum kehadiran dan juga notis permohonan untuk menangguhkan semua prosiding berkaitan dengan guaman yang difailkan oleh plaintif dan merujuk perkara tersebut kepada timbang tara menurut s. 10(1) Akta 2005 dan/atau menurut bidang kuasa mahkamah. Defendan bergantung kepada dua fasal timbang tara - iaitu kl. 4.7 dan kl. 4.11 sijil polisi ('fasal timbang tara'). Defendan mengakui liabiliti untuk tanggung rugi kerugian plaintif bagi kerugian tertentu yang berbangkit daripada gangguan kuasa dan dengan itu perbezaan atau pertikaian tunggal antara pihak-pihak

adalah berhubungan dengan jumlah atau kuantum ganti rugi yang akan dibayar kepada plaintif di bawah polisi dan oleh itu fasal timbang tara tersebut terpakai dan defendan berhak untuk merujuk pertikaian tersebut kepada timbang tara. Hakim Mahkamah Tinggi membenarkan permohonan dan keputusan itu seterusnya dikekalkan oleh Mahkamah Rayuan. Oleh itu, rayuan ini. Kebenaran untuk merayu diberikan atas persoalan sama ada mahkamah boleh membenarkan penangguhan terhadap segala prosiding di bawah s. 10(1) Akta 2005 di mana hanya sebahagian daripada perkara terangkum dalam lingkungan fasal timbang tara dan sebahagiannya tidak.

Diputuskan (menolak rayuan dengan kos; mengesahkan keputusan Mahkamah Tinggi dan Mahkamah Rayuan)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Untuk membenarkan perintah penangguhan di bawah s. 10(1) (selepas Pindaan 2011), mahkamah perlu mempertimbangkan sama ada wujud perjanjian atau fasal timbang tara yang mengikat antara pihak-pihak di mana perjanjian tidak terbatal dan tidak sah, tidak beroperasi atau tidak boleh dikuatkuasakan. Persoalan sama ada terdapat pertikaian atau tidak bukan lagi satu persoalan yang perlu dipertimbangkan dalam membenarkan penangguhan di bawah s. 10(1). Kesan jelas s. 10(1) Akta 2005 adalah untuk mengemukakan penangguhan mandatori jika mahkamah mendapati bahawa semua keperluan relevan tercapai.

(2) Cabaran terhadap bidang kuasa penimbang tara haruslah dibuat semasa prosiding timbang tara dan bukan di mahkamah yang mendengar permohonan untuk penangguhan di bawah s. 10(1). Penimbang tara mempunyai bidang kuasa untuk berurusan dengan semua perkara yang dinyatakan dalam tuntutan plaintif termasuk isu jumlah atau kuantum ganti rugi yang perlu dibayar yang melibatkan isu-isu liabiliti dan perlindungan dan perkara sampingan lain seperti perintah deklarasi, ganti rugi bagi kemungkiran polisi dan penipuan yang dilakukan oleh defendan berkenaan dengan pengeluaran polisi.

(3) Pihak-pihak terikat dengan terma-terma perjanjian timbang tara yang dilaksanakan secara sukarela termasuk rujukan kepada dokumen lain di mana terma-terma boleh didapati. HMT mendapati bahawa Polisi Jerneh yang telah tamat tempoh mengandungi fasal timbang tara yang kemudiannya dimasukkan dalam polisi terkemudian melalui rujukan yang dibuat dalam slip penempatan, dan adalah niat pihak-pihak untuk merujuk sebarang pertikaian kepada timbang tara sebagaimana terma-terma dan syarat-syarat Polisi Jerneh yang akan tamat tempoh. Dapatan ini selaras dengan peruntukan s. 9 Akta 2005 terutamanya sub-s. (5) yang secara jelas memperuntukkan bahawa rujukan dalam perjanjian mengenai dokumen yang mengandungi fasal timbang tara harus dijadikan perjanjian timbang tara; dan perjanjian itu adalah

secara bertulis dan rujukan adalah untuk menjadikan fasal sebahagian daripada perjanjian. Tidak ada alasan untuk mengganggu dapatan tersebut.

(4) Perjanjian atau fasal timbang tara adalah hujahan bertulis yang dipersetujui oleh pihak-pihak dan seperti hujahan bertulis lain, harus ditafsir mengikut bahasa dan dalam hal keadaan di mana ia dibuat. Sama ada pertikaian termaktub dalam fasal timbang tara bergantung kepada (i) pertikaian atau perselisihan antara pihak-pihak; dan (ii) pertikaian yang dirangkumi oleh fasal timbang tara. Pemohon bagi penangguhan di bawah s. 10(1) Akta 2005 oleh itu mesti membuktikan bahawa perkara yang dipersoalkan terangkum dalam skop hujahan timbang tara.

(5) Kewujudan fasal timbang tara sah dalam perjanjian antara pihak-pihak tidak secara automatik menjadikannya berkuat kuasa; fasal timbang tara hanya akan berkuat kuasa apabila pertikaian atau perselisihan terjumlah kepada fasal timbang tara. Terdapat fasal timbang tara sah antara pihak-pihak dan defendan, syarikat insurans, mengakui liabiliti secara efektif untuk melindungi plaintif, selaku pengambil insurans, meninggalkan hanya isu jumlah atau kuantum untuk ditentukan, sekaligus mencetuskan fasal. Tiada apa-apa menunjukkan bahawa perjanjian antara pihak-pihak adalah terbatal, tidak sah, tidak terpakai, tidak berkuat kuasa atau tidak dapat dilaksanakan. Liabiliti yang diakui oleh defendan mencetuskan fasal timbang tara yang mengikat pihak-pihak.

(6) Fasal timbang tara, seperti mana-mana perjanjian bertulis lain harus ditafsirkan mengikut bahasanya dan dalam hal keadaan ia dibuat. Pengecualian berkaitan dengan persoalan jumlah atau kuantum ganti rugi berkaitan dengan tafsiran terma-terma sijil polisi berkenaan item-item 'to be included' dan apa 'to be excluded' dalam lingkungan berdasarkan hujahan dan dokumen yang dikemukakan pihak diinsuranskan. Oleh itu, tuntutan plaintif, sama ada 'included or excluded' oleh defendan adalah perkara-perkara di bawah bidang kuasa fasal timbang tara antara pihak-pihak.

(7) Sama ada perbezaan atau pertikaian terangkum dalam perjanjian untuk ditimbang tara bergantung kepada pentafsiran perjanjian tersebut. Mahkamah seharusnya lebih cenderung dalam membenarkan penangguhan menanti timbang tara di bawah s. 10(1) Akta 2005, walaupun dalam kes-kes di mana mahkamah mempunyai keraguan mengenai kesahihan fasal timbang tara atau di mana ia boleh dipertikaikan sama ada hal perkara tuntutan terangkum di dalam atau di luar kuasa fasal timbang tara. Pendekatan pentafsiran bersesuaian memerlukan mahkamah untuk memberikan kesan kepada bahasa yang dipakai oleh pihak-pihak dalam fasal timbang tara yang dibenarkan, bagi tujuan komersial fasal timbang tara.

(8) Defendan adalah 'the party accused of fraud', manakala plaintif adalah 'the party alleging fraud'. Defendan, dengan memfailkan permohonan, hendak perkara tersebut diteruskan ke timbang tara; manakala plaintif menentang permohonan tersebut. Walau bagaimanapun, di bawah s. 10 Akta 2005, adalah mandatori bagi mahkamah untuk membuat perintah penangguhan apabila keperluan dalam seksyen dipenuhi. Mahkamah di sini tidak mempunyai budi bicara kecuali untuk membenarkan penangguhan sepertimana dipohon oleh defendan 'as the party accused of fraud'. Perkara sampingan seperti penipuan, ganti rugi, akaun wang yang diterima dan siasatan terhadap baki wang tertinggal dalam tangan defendan bukan asas yang mencukupi untuk menafikan penangguhan prosiding menanti timbang tara.

(9) Isu-isu dalam kes ini melibatkan persoalan fakta dan penentuan persoalan undang-undang bergantung kepada penentuan fakta yang berkaitan. Oleh itu, hujahan plaintif bahawa 'in the event of a conflict where areas of law are in dispute, the court would be a better forum to adjudicate the matter, notwithstanding the powers or scope of arbitration in general' tidak mempunyai merit dan tidak mencukupi untuk menolak permohonan penangguhan tersebut. Selanjutnya, isu masa, kos atau perbelanjaan tidak boleh dibangkitkan dalam menolak permohonan penangguhan. Perbelanjaan prosiding timbang tara juga bukan alasan untuk menolak penangguhan.

(10) Prosiding penangguhan adalah prosiding penangguhan yang telah difailkan di mahkamah. Oleh itu, permohonan untuk prosiding penangguhan hanya boleh difailkan oleh defendan selepas plaintif memulakan prosiding di mahkamah tetapi sebelum defendan mengambil apa-apa langkah lain dalam prosiding tersebut. Dalam hal keadaan ini, hujahan plaintif bahawa walaupun terdapat klausa timbang tara yang mengikat kedua-dua pihak, fasal dibaca bersama dengan kl. 4.9 polisi membenarkan plaintif untuk ke mahkamah apabila defendan menafikan liabiliti, tidak dalam apa-apa cara membantu plaintif dalam kesnya.

(11) Aturan 69 k. 10(3) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') sebagai perundangan prosedur subsidiari hanya boleh ditafsirkan dengan cara yang sejajar dengan peruntukan mandatori s. 10(1) Akta 2005. Peruntukan mandatori s. 10(1) Akta 2005 mesti diutamakan dan perkara tersebut perlu ditangguhkan sementara menunggu timbang tara jika semua keperluan yang diperlukan di bawah seksyen dipenuhi. Oleh itu, hujahan plaintif bahawa A. 69 k. 10(3) KKM 2012 mencadangkan bahawa ia adalah mahkamah yang sepatutnya membuat keputusan sama ada hal perkara tuntutan terangkum dalam terma-terma fasal timbang tara tidak boleh dikekalkan.

(12) MR secara salah telah mengguna pakai perenggan (b) s. 10 (1) Akta 2005 yang telah dimansuhkan oleh Pindaan 2011. Perenggan (b) yang dimansuhkan adalah pengecualian kepada peraturan mandatori s. 10(1) di mana kesannya adalah mahkamah tidak boleh membuat apa-apa perintah menangguhkan prosiding jika '(b) there is in fact no dispute between the parties with regard to the matters to be referred'. Dengan pemansuhan perenggan (b) tersebut, mahkamah harus memberi perintah penangguhan sama ada wujud apa-apa pertikaian antara pihak-pihak atau tidak. Dalam apa jua keadaan, kekhilafan MR tidak mempunyai apa-apa kesan terhadap keputusannya.

(13) Permohonan defendan untuk penangguhan prosiding telah memenuhi semua keperluan di bawah s. 10(1) Akta 2005. MT dan MR betul dalam membenarkan penangguhan sementara menunggu timbang tara dan tidak ada alasan jelas untuk mengganggu keputusan sejajar. Memandangkan dapatan bahawa semua perkara yang didakwa oleh plaintif dalam pernyataan tuntutannya termaktub di bawah skop atau terjumlah kepada fasal timbang tara dalam sijil polisi, adalah tidak perlu untuk menjawab persoalan undang-undang di mana kebenaran untuk rayuan diberikan.

Case(s) referred to:

AED Oil Ltd & Anor v. Puffin FPSO Ltd [2010] VSCA 3T ***(refd)***
Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd [2010] 7 CLJ 785 CA ***(refd)***
Ashville Investments Ltd v. Elmer Contractors Ltd [1988] 2 All ER 577 ***(refd)***
Caledonian Insurance Company v. Andrew Gilmour [1893] AC 85 ***(refd)***
Cunningham-Reid v. Buchanan-Jardine [1988] 2 All ER 438 ***(refd)***
Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd [2005] 4 SLR 646 ***(refd)***
Dell Computer Corp v. Union des consommateurs 2007 SCC 34 ***(refd)***
Electra Air Conditioning BV v. Seeley International Pty Ltd [2008] FCAFC 169 ***(refd)***
Fiona Trust & Holding Corporation & Ors v. Privalov & Ors [2007] 4 All ER 951 ***(refd)***
Heyman v. Darwins Ltd [1942] AC 356 ***(refd)***
KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd [2013] 1 CLJ 993 HC ***(refd)***
Munro v. Bognor Urban Council [1915] 3 KB 167 ***(refd)***
Rondabosh International Limited v. China Ping An Insurance (Hong Kong) Company Limited [2010] HKCU 8 ***(refd)***
Rowe Bros & Co Ltd v. Crossley Bros Ltd (1912) 108 LT 11 ***(refd)***
Scott v. Avery [1843-60] All ER Rep 1 ***(refd)***
Smith v. Pearl Assurance Co Ltd [1939] 1 All ER 95 ***(refd)***
Sulamérica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors [2012] EWCA Civ 638 ***(refd)***
Tjong Very Sumito and Ors v. Antig Investments Pte Ltd [2009] SGCA 41 ***(refd)***
TN Rao v. Balabhadra AIR 1954 Mad 71 SC ***(refd)***
TNB Fuel Services Sdn Bhd v. China National Coal Group Corp [2013] 1 LNS 288 CA ***(refd)***

Legislation referred to:
Arbitration Act 1952 (since repealed), s. 6
Arbitration Act 2005, ss. 1, 8, 9(5), 10(1), 11, 18(1), (5), (8)
Rules of Court 2012, O. 69 r. 10(1), (3)

Arbitration Act 1950 [UK], s. 4(1)
International Arbitration Act (Cap 143A) [Sing], s. 6(2)

Other source(s) referred to:
Halsbury's Laws, 4th edn, para 566, p 292

For the appellant - Lim Kian Leong, Justin Voon, Alvin Lai & Goh Gin Jhen; M/s Justin Voon Chooi & Wing
For the respondent - Anad Krishnan & Navamalar; M/s Anad & Noraini

[Editor's note: For the Court of Appeal judgment, please see Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2015] 4 CLJ 734 (affirmed).]

Reported by S Barathi

JUDGMENT

Ramly Ali FCJ:

The Appeal

[1] The appellant in the present appeal before us was the plaintiff at the High Court, while the respondent was the defendant. This appeal is against the decision of the Court of Appeal made on 30 October 2014, dismissing the plaintiff's appeal relating the decision of the High Court made on 12 June 2014, whereby the learned High Court Judge granted a stay of proceedings pending referral of the dispute to arbitration, based on an application made by the defendant pursuant to s. 10 of the Arbitration Act 2005 (the 2005 Act). In this judgment, the parties will be referred to as they were in the High Court.

The Parties

[2] At all material times, the plaintiff, Press Metal Sarawak Sdn Bhd, was a company incorporated in Malaysia with a registered address at Lots 15 and 37, Block 20, Kemena Land District, Tanjung Kidurong, 97000 Bintulu, Sarawak and a business address at Lots 211 and 212, Block 293 Mukah Land District, KM 38, Jalan Mukah-Balingian, 96400, Mukah, Sarawak. The plaintiff owned and operated an aluminium smelting plant at the business address (the Mukah Plant). It is a process of extracting aluminium from its oxide, namely alumina, by the process of electrolysis. The plant which began operation on or about August 2009, was the first aluminium plant set up in Malaysia.

[3] The defendant, Etiqa Takaful Berhad, at all material times, was a company incorporated in Malaysia with a registered and business address at Level 19, Tower C, Dataran Maybank No. 1, Jalan Maarof, 59000 Kuala Lumpur and was in the business of providing insurance and takaful products.

Factual Background

[4] With the foregoing brief introduction, we will now address the salient facts of the case.

[5] By a contract of insurance, which was evidenced by a placement slip numbered D12EE0852324 dated 24 October 2012 (placement slip), and a policy certificate, the defendant, as the lead Takaful operator, agreed with the plaintiff, in consideration for the payment of a premium of RM300,000 among others, to insure all critical plants and machineries including pots and furnaces, parts, accessories, tool systems and installation ("machinery breakdown") and loss of profits ("loss of profits") against sudden and unforeseen damage from any cause not excluded, occurring after successful completion of acceptance tests while working or at rest and during overhaul cleaning or movement in the premises for such purposes. The sum insured for machinery breakdown was RM200 million and for the loss of profits was RM100 million.

[6] On 27 June 2013, the State of Sarawak was affected by a wide power outage which resulted in disruption of the plaintiff's smelting operation and forced a temporary shutdown of the Mukah Plant. As a result, the plaintiff suffered substantial losses and damage.

[7] On the next day (28 June 2013), the plaintiff notified the defendant of the incident. In October 2013, the plaintiff indicated to the defendant's appointed loss adjusters, Cunningham Lindsey Adjusters Malaysia (Cunningham Adjusters) that its estimated indemnifiable losses were in the region of RM125 million. In the meantime, while adjustment was taking place on 24 September 2013, the plaintiff applied for an interim payment of RM15 million for machinery breakdown.

[8] *Vide* letter dated 15 November 2013, the defendant indicated to the plaintiff that "... it is clear from the investigation carried out by Cunningham Lindsay Adjusters (M) Sdn Bhd (CLAM) on our behalf that the certificate is engaged by the loss and that there will be some indemnity to PMS (the plaintiff). The question that we have been analysing ... is the extent of that indemnity." In that letter, the defendant disclaimed substantially its payment in respect of the plaintiff's claim for machinery breakdown and payment in respect of the plaintiff's claim for loss of profits by relying on various exclusion clauses contained in the insurance policy, particularly cls. 3.2, 2.2 and 2.8 thereto. The defendant estimated that based on their analysis, the amount of indemnity provided by the policy was to be approximately RM3.7 million, not RM125 million as claimed by the plaintiff.

[9] On the same date, the defendant issued a notice of arbitration pursuant to cl. 4.7 in s. 1 of the policy in respect of machinery breakdown; and cl. 4.11 in s. 11 in respect of loss of profits. However, the plaintiff was not agreeable to refer the matter for arbitration.

[10] On 13 February 2014, the plaintiff commenced legal proceedings at the High Court against the defendant claiming, *inter alia*, for an indemnity by the defendant under the policy in respect of all losses and damage suffered by the plaintiff arising out of the incident and also for various declaratory orders and damages for breach of the policy and/or fraud committed by the defendant in the issuance of the policy.

[11] On 28 February 2014, the defendant filed its memorandum of appearance. On the same date the defendant also filed a notice of application to stay all proceedings relating to the suit filed by the plaintiff and to refer the same to arbitration pursuant to s. 10(1) of the 2005 Act and/or pursuant to the inherent jurisdiction of the court. The defendant relied on two arbitration clauses – namely cl. 4.7 and cl. 4.11 of the policy certificate relating to machinery breakdown policy and loss of profits respectively. Both the clauses are exactly of the same wording and effect ie "if any difference arises as to the amount to be paid under this certificate (liability being otherwise admitted) such difference shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference ... " (In this judgment, we shall refer to both clauses as "the arbitration clauses").

[12] In its application, the defendant contended that it had admitted liability to indemnify the plaintiff for certain losses arising from the power outage and as such the sole difference or dispute between the parties was in relation to the amount or quantum of indemnity to be paid to the plaintiff under the policy and therefore the respective arbitration clauses applied and the defendant was entitled to refer the dispute to arbitration.

At The High Court

[13] The learned judge on 12 June 2014 allowed the defendant's application and ordered that all proceedings relating to the suit at the Kuala Lumpur High Court (*vide* Suit No. 22 NCC-53-02-2014) be stayed pending arbitration pursuant to s. 10(1) of the Act 2005 and/or the inherent jurisdiction of the court. In coming to her decision, the learned judge found that there existed arbitration clauses between the parties in the policy, and the clauses extended to matters claimed by the plaintiff in the pending suit before the court. The learned judge further ruled that the arbitration clauses in the present case were clear and formed part of the contract between the parties and were not null and void or incapable of being performed.

At The Court Of Appeal

[14] Dissatisfied with the decision of the High Court, the plaintiff appealed to the Court of Appeal. On 30 October 2014, the Court of Appeal unanimously dismissed the plaintiff's appeal with costs in the cause of arbitration.

[15] In dismissing the appeal, the Court of Appeal ruled that the court had no discretion but to grant a stay of the proceeding save and except for the exceptions set out in s. 10(1) of the 2005 Act. The Court of Appeal agreed with the learned judge that the arbitration clauses in question were not null and void or incapable of being performed. In para. 5 of the judgment, the Court of Appeal ruled:

> [5] Under the said Act, the court has no discretion but to grant a stay save and except for the exceptions set out above in section 10(1) of the said Act. The learned Judge held and we agree, the Arbitration clause is clear, part of the contract between the parties and it is not a nullity or incapable of being performed. At any rate the question of whether the Arbitration clause is a part of the contract of Insurance between the parties or not is a matter that goes to jurisdiction of the appointment of the Arbitrator and the Arbitrator is competent to deal with that issue at the Arbitration itself (see section 18 of the said Act). As a matter of policy, the courts should be slow to place technical hurdles against having the matter referred to arbitration in the face of the clear injunction to do so by section 10 of the said Act.

[16] The Court of Appeal concluded that "there are in fact several disputes between the parties with regards to matters to be referred and therefore come within the scope of s. 10(1) of the said Act."

At The Federal Court

[17] The plaintiff filed an application for leave to appeal to this court against the judgement of the Court of Appeal. On 26 March 2015, leave to appeal was granted on the following question:

> May a court grant a stay of all proceedings under Section 10(1) of the Arbitration Act 2005 where only part of the matter in issue falls strictly within the ambit of the arbitration clause and part does not?

Submissions By The Plaintiff's Counsel

[18] The plaintiff opposed the defendant's application to stay the proceedings. The plaintiff's stand was that s. 10(1) of the 2005 Act was not applicable to the present case as the placement slip did not contain an arbitration clause and there was no provision in the placement slip which allowed for the incorporation of an arbitration clause in the policy in question and therefore there was no arbitration agreement or clause in existence between the parties at the material time.

[19] The plaintiff submitted that a stay ought not to be granted and the matter should instead be decided in court. The plaintiff further submitted that even if the arbitration clauses existed, they did not apply to the facts of the present case and its application was limited and specific in its operation to cover only differences as to the amount or quantum to be paid under the policy when liability had been admitted. The plaintiff contended that the arbitration clauses were not applicable in respect of liability as on the face of them that issue was expressly excluded from their ambit.

[20] The plaintiff further submitted, that the matter ought not to be referred to arbitration as it was beyond the arbitrator's jurisdiction to deal with it on the ground that liability was not admitted on very significant portions of the plaintiff's claim for machinery breakdown and *in toto* for loss of profits; and it was for the court, and not the arbitrator to decide on whether the subject matter fell within the terms of the arbitration clause or otherwise.

[21] In concluding its submissions, the plaintiff contended that:

(a) The Court of Appeal had erred in applying the wrong law in s. 10(1) of the 2005 Act which had been repealed by the Arbitration (Amendment) Act 2011 (the 2011 Amendment);

(b) The Court of Appeal and High Court had erred in their interpretation of the law, particularly s. 10(1) of the 2005 Act; and the section could not be interpreted to compel a party to submit to arbitration where the disputes were outside the scope or ambit of the arbitration clauses;

(c) Even if some of the plaintiff's claims fell partly within and partly outside the scope or ambit of the arbitration clauses, the balance of convenience favoured that the entire dispute be remitted to the High Court to be tried;

(d) The answer to the question posed in the present appeal ought to be in the negative; and

(e) The arbitrator could not hear allegations of breach of duty of good faith and fraud, which were outside the scope or ambit of the arbitration clauses, and therefore the court should not grant the stay.

Submissions By The Defendant's Counsel

[22] In response to the submissions by the plaintiff, the defendant submitted that it had fulfilled the requirements set out in the arbitration clauses in question, ie (i) that it had admitted liability to indemnify the plaintiff under the policy, and (ii) the difference which arose between the plaintiff and the defendant was only as to the amount or quantum to be paid under the policy. Therefore the matter should be referred to arbitration pursuant to s. 10(1) of the 2005 Act. The defendant stressed that its coverage letter dated 15 November 2013, notice of arbitration dated 15 November 2013 and another letter dated 12 February 2014 to the plaintiff, clearly indicated that the defendant had admitted such liability, and that the amount

or quantum of such payment was the only difference remaining for determination; and that therefore the matter fell entirely within the ambit of the arbitration clauses.

[23] The defendant further submitted that reading ss. 18(1), 8, and 10(1) of the 2005 Act and the arbitration clauses, one could conclude that the matter (since liability had been admitted) must be referred to arbitration and the proceedings before the court must be stayed pending arbitration. The court had no discretion. It was a mandatory statutory requirement.

[24] The defendant also submitted that, except where the arbitration clause was found to be null and void, inoperative and inapplicable, a court should not enquire into the facts of the dispute in question and should instead stay the proceedings and leave the arbitrator to determine the question of its own jurisdiction, which included whether or not a dispute fell within the scope or ambit of the arbitration clause. To support this submission two authorities were cited by the defendant, namely, *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288, and *Tjong Very Sumito and Ors v. Antig Investments Pte Ltd* [2009] SGCA 41.

[25] The defendant also submitted that the plaintiff had failed to show that the arbitration clauses in question were null and void, inoperative or incapable of being performed in order to escape the stay order under s. 10(1) of the 2005 Act.

[26] On the allegations of breach of duty of good faith and fraud, raised by the plaintiff, the defendant argued that the allegation was not a reason for refusing a stay in favour of arbitration under s. 10(1) of the 2005 Act; and an arbitral tribunal can deal with ancillary issues such as allegations of fraud. As a supporting authority the defendant cited the case of *Cunningham-Reid v. Buchanan-Jardine* [1988] 2 All ER 438.

Decision Of This Court

Section 10(1) Of The 2005 Act

[27] The present appeal relates to an interpretation of s. 10(1) of the 2005 Act in an application for a stay of proceedings in court pending reference to arbitration based on arbitration clauses. The application was filed by the defendant. The plaintiff objected. The High Court Judge allowed the application. The Court of Appeal upheld the decision. Hence the present appeal before us.

[28] The present s. 10(1) of the 2005 Act (as amended *vide* Act A1395 which came into force on 1 July 2011 (2011 Amendment)) reads:

> 10. (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[29] Prior to the 2011 Amendment, s. 10(1) provided as follows:

> Arbitration agreement and substantive claim before court
>
> 10.(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[30] Paragraph (b) of s. 10(1) was completely repealed by the 2011 Amendment. Previously, there must be in existence a dispute between the parties with regard to the matter to be referred, before a court is empowered to make an order under s. 10(1). With the deletion of para. (b) the only remaining exception under the present s. 10(1) is that the arbitration agreement between the parties is null and void, inoperative or incapable of being performed.

[31] Prior to the 2005 Act, the applicable law was the Arbitration Act 1952 (the 1952 Act). The issue of stay of proceedings in the 1952 Act was dealt with under s. 6 thereof which reads:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[32] The clear effect of the present s. 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled; while under s. 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.

[33] What the court needs to consider in determining whether to grant a stay order under the present s. 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference. (see *TNB Fuel Services Sdn Bhd* (*supra*)). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). It is an issue to be decided by the arbitral tribunal.

[34] In order to better appreciate the legal effect of s. 10(1) of the 2005 Act, other related sections, namely ss. 8 and 18, must also be considered.

Sections 8 And 18 Of The 2005 Act

[35] Section 8 of the 2005 Act, which came into effect on 1 July 2011, reads:

> No court shall intervene in matters governed by this Act, except where so provided in this Act.

[36] As stated in the explanatory statement to the Arbitration (Amendment) Bill 2010, (which later was passed as the 2011 Amendment), the purpose of this provision is "to limit court intervention to situations specifically covered by the Arbitration Act and to discourage the use of inherent powers by court?"

[37] Section 18 deals with the jurisdiction of the arbitral tribunal. It reads:

> Competence of arbitral tribunal to rule on its jurisdiction
>
> 18.(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement; and
>
> (2) For the purposes of subsection (1):
>
> (a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and
>
> (b) a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.
>
> (3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
>
> (4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.
>
> (5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.
>
> (7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.
>
> (8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).

[38] The court must acknowledge the competency of an arbitral tribunal to decide on its own jurisdiction without interference. The intention of Parliament is clear. Reading ss. 8, 10 and 18 together would indicate that Parliament has given the arbitral tribunal much wider jurisdiction and powers; and such powers extend to cases where even its own jurisdiction or competence or the scope of its authority, or the existence or validity of the arbitration agreement or clause, is challenged. To comply with the requirements of s. 10(1) the court should restrict its enquiry only to the issue of whether there is in existence a binding arbitration agreement or clause between the parties and whether the arbitration agreement or clause is null and void, inoperative or incapable of being performed. If the court is satisfied that the arbitration agreement or clause does not fall into any of these exceptions, it must order a stay of proceedings and refer the matter to arbitration.

Jurisdiction Of An Arbitral Tribunal

[39] On the issue of jurisdiction of an arbitral tribunal and the provisions of s. 18 of the 2005 Act, learned authors of the book *The Arbitration Act 2005*, UNCITRAL Model Law as applied in Malaysia, Sundra Rajoo and WSW Davidson, commented to the following effect:

> Section 18 deals with the issue of who is to decide on the arbitral tribunal's jurisdiction and corresponds with article 16 of the Model Law. It is one of the key pillars of the Model Law. Like article 16, section 18 sets out two general principles, namely the doctrines of *Kompetenz-Kompetenz* and separability. The remaining parts of the section deal with the prescribed procedures for raising a plea of the arbitral tribunal's lack of jurisdiction, including the relevant time limits for raising it. The last part of the section provides however, a plea is dealt with - initially by the arbitral tribunal and later by the High Court, which has the last word on the issue of an arbitral tribunal's jurisdiction.

[40] A challenge to the jurisdiction of an arbitrator must be made during the arbitration proceedings itself, but not at the court hearing an application for a stay under s. 10(1) (see: s. 18(5)). It is the arbitrator who decides the issue of jurisdiction. Any ruling of the arbitrator that it has jurisdiction, can be appealed to the High Court which will finally decide the matter (see: s. 18(8)).

[41] It is instructive to refer to the Canadian judicial pronouncement on the same issue of jurisdiction of an arbitrator, in dealing with the issue of stay of proceedings under the provisions of our s. 10(1) of the 2005 Act. The Canadian legislation on arbitration is in *pari materia* with our legislation.

[42] In *Dell Computer Corporation, Appellant v. Union des Consommateurs and Oliver Dumoulin, Respondents, and Canadian Internet Policy and Public Interest Clinic, Public Interest Advocacy Centre, ADR Chambers Inc ADR Institute of Canada and London Court of International Arbitration, Interveners* 2007 SCC 34, the Canadian Supreme Court laid down the following principles and guidelines, on the issue of jurisdiction and stay of proceedings pending arbitration, similar to s. 18(5) of our 2005 Act:

> In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence-competence principle, which has been incorporated into art. 943 C.C.P. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorised by art. 940.1 C.C.P., is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.

Valid Arbitration Agreement

[43] The first issue which must be determined under s. 10(1) of the 2005 Act is whether there is in existence a valid and binding arbitration agreement or clause between the parties relating to the subject matter of the claim in question.

[44] The relevant provision relating to the issue of an arbitration agreement are in s. 9 of the 2005 Act, which reads:

> Definition and form of arbitration agreement
>
> 9.(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing where it is contained in:
>
> (a) a document signed by the parties;

A (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

B (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[45] In the present case, the plaintiff contended that there was no C arbitration agreement or clause between the parties as the purported arbitration clauses in the present case were not part of the insurance policy between them. The plaintiff claimed that the placement slip numbered D12EE0852324 issued by the defendant to the plaintiff in respect of the insurance policy in question by itself contained no arbitration clause. The D plaintiff further claimed that there was no provision in the placement slip which allowed for the incorporation of a subsequent term or condition, especially an arbitration clause. The plaintiff also claimed that it was accordingly not bound by the terms of the previous policy which had already expired.

E **[46]** The defendant contended that the insurance policy in question was the same as the previous insurance policy issued by Jerneh Insurance Berhad to the plaintiff (Jerneh Policy). Subsequently the defendant had replaced Jerneh as the plaintiff's insurer. The defendant relied on the terms of the previous Jerneh Policy to support its contention that on the strength of the placement F slip, there existed an arbitration clause between them as the insured and the insurer.

[47] Based on the evidence adduced during trial, the learned judge found that there was an agreement between the defendant and BIB Brothers (who were acting as agent for the plaintiff) with express authority that the insurance G policy issued by the defendant was to be based upon the terms of the expired previous Jerneh Policy issued by Jerneh Insurance Bhd. but with a reduced deductible at RM300,000.

[48] The learned judge made a finding that "even though the placement slip do not expressly contain an arbitration clause, it is not a disputed fact that H the placement slip makes reference to the following: Renewal of Policy No. HW-E0023997-EMB-R002." The learned judge concluded that the evidence adduced by the defendant clearly showed that the above reference related to the policy number of the previous Jerneh Policy and there was an understanding between the parties that the new policy would be based upon I the terms of the expired Jerneh Policy.

[49] Together with other supporting documentary evidence in the form of an e-mail from the defendant dated 24 October 2012 which also made reference to the placement slip and the renewal of the Jerneh Policy, and a series of e-mails between the plaintiff and its authorised broker, BIB Insurance, particularly an e-mail dated 2 October 2012 from BIB Insurance, sent to the defendant, which clearly made reference to the renewal of the previous Jerneh Policy, the learned judge concluded that the expired Jerneh Policy contained an arbitration clause in relation to both the machinery breakdown and the loss of profits sections of the cover, and the said arbitration clause was effectively incorporated in the latter policies by the reference made in the placement slip.

[50] In light of all those findings, the learned judge held that "in my view the intention of the parties was that any disputes would be referred to arbitration as per terms and conditions of the expiring Jerneh Policies and agreement extends to the matters claim in this suit."

[51] We agree with the findings of the learned judge on this issue. These are findings of fact based on the evidence adduced before the court. We find that these findings are consistent with the provisions of s. 9 of the 2005 Act, particularly sub-s. (5) thereof which clearly provides that a reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement; and the agreement is in writing and the reference is such as to make that clause part of the agreement. We find no reason to disturb them.

[52] The provisions of s. 9(5) of the 2005 Act were correctly dealt with by the Court of Appeal in *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785; [2010] 3 MLJ 656, where it was ruled:

> It is clear from the reading of the above provision (i.e. s. 9(5)) that the agreement itself need not have an arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement.

[53] The legal position on this issue is clear: that parties are bound by the terms of the arbitration agreement which they had voluntarily executed and this includes reference to another document where those terms can be found, whether they take the trouble of reading them or not. There is imputed knowledge that the terms of arbitration agreement in a document referred to in an agreement are binding as if they were written in the latter agreement itself.

[54] The decision of the Indian Supreme Court in the case of *TN Rao v. Balabhadra* AIR 1954 Mad 71, supports the above proposition. Venkatarama Aiyar J in that case ruled:

> When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does

A not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are
B either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold that when the parties had referred to a document which was in
C existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated *in extenso* in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is essential
D that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties there must at least be a specific contract or document
E containing such a clause in respect of which it might be said that it has been incorporated in the agreement of the parties by reference.

Scope Of Arbitration Clauses

[55] An arbitration agreement or clause is a written submission, agreed to by the parties, and like other written submissions, must be construed
F according to its language and in the light of the circumstances in which it is made (see: *Heyman v. Darwins Ltd* [1942] AC 356, per Viscount Simon LC at p. 366). The question whether a given dispute comes within the provisions of an arbitration clause or not, primarily depends on the wording of the clause itself. (see: *Heyman v. Darwins Ltd*. (*supra*) per Lord Porter at p. 392).

G **[56]** Parties must be held to what they have agreed to in an agreement. Therefore, it is essential to consider the wordings of the clause specifically and determine what they have agreed to. Whether a dispute falls within an arbitration clause must depend on (a) what is the dispute or difference between the parties and (b) what disputes the arbitration clause covers
H (see: *Heyman v. Darwins Ltd* (*supra*) per Viscount Simon LC at p. 360).

[57] The court must see what the matters as found in the proceedings before the court are, and then consider whether they are within the scope of the submissions in the arbitration clause. (see: *Munro v. Bognor Urban Council* [1915] 3 KB 167: per Bankes LJ at p. 172). An applicant for a stay under
I s. 10(1) of the 2005 Act must therefore establish that the matters in question are within the scope of the arbitration submission.

[58] In the case before us, the arbitration clauses under which this application is made are as follows:

(a) In respect of machinery breakdown, the arbitration clause is contained in s. 1, cl. 4.7 of the policy certificate and is set out below in full:

> 4.7 If any difference arises as to the amount to be paid under this Certificate (liability being otherwise admitted), such difference shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or, if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in writing by each of the parties, within one calendar month of being required to do so by either of the parties, or, in case the arbitrators do not agree, of an umpire to be appointed in writing by the arbitrators before the latter enter upon the reference. The umpire shall sit with the arbitrators and preside at their meetings. The making of an award shall be a condition precedent to any right of action against the company.

(b) In respect of loss of profits, the arbitration clause is contained in s. II, cl. 4.11 of the policy certificate and is set out below in full:

> 4.11 if any difference arises as to the amount to be paid under this Certificate (liability being otherwise admitted), such difference shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or, if they cannot agree upon a single arbitrator, to the decision of two arbitrators, one to be appointed in writing by each of the parties, within one calendar month of being required to do so by either of the parties, or, in case the arbitrators do not agree, of a umpire to be appointed in writing by the arbitrators before the latter enter upon the reference. The umpire shall sit with the arbitrators and preside at their meetings. The making of an award shall be a condition precedent to any right of action against the Company.

[59] In response to the plaintiff's claim the defendant repeatedly indicated that the policy "is engaged by the loss and that there will be some indemnity to PMS (the plaintiff) ... the question that we have been analysing, together with CLAM and other advisors, is the extent of that indemnity." It was also indicated by the defendant that "our current analysis is that the indemnity provided by the certificate is likely to be approximately MYR3,700,000 (after applying the deductible)". The defendant reiterated its same position in its coverage letter to the plaintiff dated 15 November 2013, its formal notice of arbitration (also dated 15 November 2013) and another letter to the plaintiff dated 12 February 2014. Clearly, the defendant could not agree with the amount of RM125 million as claimed by the plaintiff. The amount was in dispute.

[60] The defendant contended, in the light of its statements above, that the only difference between the parties was as to the amount or quantum of indemnity to be paid under the policy, since liability had been admitted by

A the defendant; and reference to an arbitration pursuant to the arbitration clauses was only for determination on the amount or quantum, but not on liability; and this was clearly within the scope of the arbitration clauses.

[61] The plaintiff refused to accept the amount offered by the defendant and contended that the defendant had applied certain exclusions to certain heads
B of the plaintiff's claim as found in the policy certificate, to disclaim certain claims on machinery breakdown and loss of profits. Therefore the plaintiff argued that the dispute between the parties was not about the amount or quantum of indemnity to be paid under the policy, but instead, was a dispute over liability to pay, which was outside the scope or ambit of the arbitration
C clauses, thus making the clauses not applicable and therefore the matter ought not to be referred to arbitration under s. 10(1) of the 2005 Act.

[62] We have considered the terms of the policy in the certificate, relating to both s. 1 for machinery breakdown and s. 11 for loss of profits. Basically the defendant's liability as the insurer under the policy is to indemnify the
D plaintiff, as the insured, by payment in cash, in respect of any loss or damage suffered by the plaintiff as a result of the incident that occurred. This is clearly provided for in cl. 1.0 of both ss. 1 and 11 of the policy certificate.

[63] The amount of indemnity to be paid by the defendant to the plaintiff under the policy shall not exceed the amount specified in respect of each of
E the items listed in the schedule thereto or in the whole, the total sum of RM300 million as insured. However, such payment of indemnity is subject to the exclusion clauses as provided under cl. 2.2 of the policy.

[64] Based on the evidence available we are satisfied that liability in the
F matter had been admitted, leaving in dispute only the issue of amount or quantum to be paid. In the circumstances, such admission of liability by the defendant is sufficient to bring the dispute or difference within the scope or ambit of the arbitration clauses. Therefore, we cannot agree with the plaintiff's submission that the dispute between them relates not only to the
G issue of amount or quantum but also to liability. In our view liability which had been effectively admitted by the defendant, triggered the arbitration clauses which bind the parties.

Matters Within The Scope Of The Arbitration Clauses

[65] The next question for determination is whether the plaintiff's claim in
H the court proceedings falls within the ambit or scope of the arbitration clauses.

[66] In its action filed in court, the plaintiff in its statement of claim sought, *inter alia,* for full indemnity in respect of all losses and damages, suffered as
I a result of the incident (ie RM125 million as claimed) and for various declaratory orders and damages for breach of the terms of the policy and/ or fraud committed by the defendant in respect of the issuance of the policy certificate.

[67] The plaintiff maintained that since the arbitration clauses only catered for such difference as to the amount or quantum of the indemnity payment, the issue of liability together with other issues such as breach of duty of good faith, fraud, declaratory orders and damages were clearly outside the scope or the ambit of the arbitration clauses and thus the arbitration clauses were not triggered and therefore inoperative.

[68] The plaintiff further maintained that the arbitration process should be confined within the strict ambit of the arbitration clauses, otherwise it would be *ultra vires* its powers and jurisdiction. The plaintiff prayed that the stay order granted by the High Court (which was affirmed by the Court of Appeal) "be set aside as even if there is a dispute to the quantum for the RM3.7 million admitted (where there is none), only this small part of the matter is within the arbitration clauses."

[69] The law on the issue of whether a dispute or difference comes within the scope or ambit of an arbitration clause is clear and well-settled. The existence of a valid arbitration clause in an agreement between the parties does not automatically make it operative; the arbitration clause will only be operative when the given dispute or difference falls within the ambit of the arbitration clause.

[70] As stated earlier, an arbitration clause, like any other written agreement, must be construed according to its language and in the light of the circumstances in which it is made. In this regard Viscount Simon LC in *Heyman v. Darwins* (*supra*) said at p. 360 of the report:

> The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what is the dispute and (b) what disputes the arbitration clause covers.

[71] The answer as to what the dispute is all about has to be gathered from the affidavits filed in the application for stay, from the correspondence before the writ as exhibited in those affidavits and from the endorsement on the writ itself.

[72] Lord Macmillan, in that case, had given a comprehensive guideline of the law on the matter, as follows (see: p. 370):

> Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause, and the clause having been found to be still effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.

A In our view, the aforesaid guidelines provide useful reference by our courts in dealing with the matter. In the context of s. 10(1) of the 2005 Act, "sufficient reason why the matter in dispute should not be referred to arbitrator" refers to the fact that the agreement is null and void, inapplicable or incapable of being performed.

B **[73]** In *Sulamérica CIA Nacional De Seguros SA & Ors v. Enesa Engenharia SA & Ors* [2012] EWCA Civ 638, the English Court of Appeal dealt with an arbitration clause which reads:

> In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute
C shall then be referred to arbitration under ARIAS Arbitration Rule.

[74] Lord Justice Moore – Bick upheld the ruling made by the trial judge to the effect that "As a matter of language, a failure to agree "as to the amount to be paid under this policy" includes a dispute about whether any sum is due under the policy at all, and thus includes matters of liability and
D coverage".

[75] In that case, a dispute arose between the insured and the insurers relating to two policies of insurance against various risks arising in connection with the construction of a hydroelectric generating plant in
E Brazil, where the insured made claims under the policies, but the insurers declined liability on the grounds that the losses were uninsured or excluded by express terms of the policies. The trial judge (Cooke J), ordered the dispute to be referred to arbitration. Leave to appeal of the Court of Appeal was refused.

F **[76]** In the above decision the trial judge rejected the insured's submissions that "the current dispute between the parties, which concerns the insurer's liability to indemnify them under the policy, falls outside the scope of the agreement, which is limited to disputes about the amount to be paid in respect of any individual loss." The rejection by the trial judge was upheld
G by the Court of Appeal. Thus, the law established in that case is that the issue of a "failure to agree as to the amount to be paid under an insurance policy includes a dispute whether any sum is due under the policy at all." As said by Lord Justice Moore-Bick, it the clause "enables either party to refer to arbitration any dispute arising out of or in connection with the policy."

H **[77]** In *Caledonian Insurance Company v. Andrew Gilmour* [1893] AC 85, the House of Lords dealt with a case involving an insurance claim under a policy which contained the following arbitration clause:

> Where the company does not claim to avoid its liability under the policy, on the ground of fraud or non-fulfilment of any of the conditions
I hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties, or of two independent persons ... who should choose an umpire.

[78] In essence the above clause in Caledonian Insurance dealt with a difference or dispute as to the amount payable under the policy where liability had not been avoided by the insurer. In interpreting the clause, the House of Lords followed its earlier decision in *Scott v. Avery* [1843-60] All ER Rep 1, in which Lord Campbell, referring to the condition of the policy in question, gave his opinion that "it embraces not only the assessment of damages, the computation of quantum, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers as well as the amount to be paid."

[79] The plaintiff in the present case is claiming for indemnity under the policy for a sum of RM125 million while the defendant, after analysing the claim and the terms of the policy offered only a sum of RM3.7 million. There is therefore a clear case of a vast difference as to the amount or quantum to be paid as indemnity under the policy. The difference covers claims under certain exclusions of items as provided in the terms of the policy certificate. These include items 1, 2, 3, 5 and 8 under the machinery breakdown coverage (s. 1); item 6 for restoration and re-commissioning costs and loss of service life of pot components under exclusion 2.2. The defendant agreed to pay in respect of aside/arms/bi-metallic joints for machinery breakdown. As for loss of profits cover (s. 11), exclusion 2.8 (d) of the policy certificate operates to exclude the plaintiff's claim under this head, on the ground that this cover would generally be triggered where covered machinery suffers from unforeseen and sudden physical loss or damage requiring immediate repair and the plaintiff's business is interrupted as a result.

[80] Applying the principles laid down in the above cited cases, the exclusions which relate to the question of amount or quantum of indemnity, also relate to the interpretation of the terms of the policy certificate, on what items are "to be included" and what are "to be excluded" in the coverage based on submissions and documents adduced by the insured. Therefore, the claims by the plaintiff, whether "included or excluded" by the defendant, are matters within the ambit of the arbitration clauses between the parties. Ultimately, this will determine the amount or quantum to be paid under the policy.

[81] The plaintiff contended that the arbitration clauses in this case are inapplicable, inoperative or incapable of being performed, on the ground that the matter claimed was outside their scope or ambit which according to the plaintiff, would only apply where there was a "full admission of liability on all heads of the claim".

[82] On this issue we are in agreement with the submissions of learned counsel for the defendant that:

> in an insurance dispute, the two main issues to be dealt with are liability and quantum. In this case, the defendant has admitted liability. The only question remaining for determination is therefore quantum. The majority

> of insurance claims on complex industrial property and machinery submitted by the insured involve claims for both insured and uninsured losses, and the exercise of evaluating the precise amount to be paid under the insurance policy involves applying the terms and conditions of the relevant policy, not just calculating the amount of the insured's loss. The current dispute is therefore not a dispute on liability but one of quantum.

[83] The position in Hong Kong on this issue is the same. In *Rondabosh International Limited v. China Ping An Insurance (Hong Kong) Company Limited* [2010] HKCU 8, the High Court of Hong Kong dealt with an almost identical arbitration clause in an insurance policy which reads:

> If the difference shall arise as to the amount to be paid under the policy, such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference ...
>
> And it is hereby expressly stipulated and declared that it shall be a condition precedent to any rights of action or suit upon the policy that the award by such arbitrator or umpire of the amount of the loss or damage if disputed shall be first obtained.

[84] In that case, the insured argued that the arbitration clause only covered dispute as to the amount or quantum, and since the insurer had disputed liability under the policy on the ground that the insured had no insurable interest in some of the damaged stocks, therefore the claim, not being solely on the question of "the amount to be paid under the policy", was beyond the ambit of the arbitration clause. The insured argued that the arbitration clause in that case was inoperative in that it did not cover the dispute in the claim.

[85] At trial, the insurer adduced evidence to show that its solicitors had indicated in writing to the insured that "our client admitted liability in the above matter leaving the amount of compensation to be determined."

[86] The High Court of Hong Kong held:

> Where there is a written agreement to arbitrate, the court normally has no discretion. It must hold the parties to their agreement and stay a pending action to arbitration. The court can only refuse a stay of pending proceedings if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. (see: Section 6 and Article 8 of the UNCITRAL Model Law.)

[87] The High Court in rejecting the insured's argument, further held that "That dispute is well within the compass of the arbitration agreement. Such question and others like it should therefore be referred to an arbitral tribunal in accordance with the parties' bargain. There is no basis for refusing a stay to arbitration."

[88] The court should lean more towards granting a stay pending arbitration under s. 10(1) of the 2005 Act, even in cases where the court is in some doubt about the validity of the arbitration clause or where it is arguable whether the subject matter of the claim falls within or outside the

ambit of the arbitration clause. The recent decision of the Singapore Court of Appeal supports this proposition. In *Tjong Very Sumito* (*supra*), the Singapore Court of Appeal agreed with the approach taken by the trial judge, Woo J in *Dalian Hualiang Enterprise Group Co Ltd v. Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646, that "if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered." It was also held in that case, that "if the arbitration agreement provides for arbitration of "disputes" or "difference" or "controversies", then the subject matter of the proceedings in question would fall outside the terms of the arbitration agreement if (a) there is no "dispute", "difference" or "controversy" as the case may be; or (b) where the alleged "dispute" is unrelated to the contract which contains the arbitration agreement.

[89] In that case, the Court of Appeal dealt with an application for a stay of proceedings pending arbitration under s. 6 of the International Arbitration Act (1AA) (Cap 143A, 2002 Rev Ed) which even though differently worded, has the same effect as our s. 10(1) of the 2005 Act. Section 6(2) of the 1AA provides:

> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable or being performed.

[90] The court held that the question as to whether a matter is the subject of an arbitration clause is the very threshold to the application of s. 6 of the IAA; and it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration clause.

[91] In determining what is the dispute or difference the parties intended to submit to arbitration, the arbitration clause ought to be interpreted widely, based on its express terms and the intention of the parties, taking into consideration the commercial reality and the purpose for which the contract or agreement was made. A proper approach to construction requires the court to give effect, so far as the language used by the parties in the arbitration clause will permit, to the commercial purpose of the arbitration clause. This principle was adopted in *Fiona Trust & Holding Corporation & Ors v. Privalov & Ors* [2007] 4 All ER 951.

[92] The above principle was followed by our courts. In *KNM Process Systems Sdn Bhd v. Mission Biofuels Sdn Bhd* [2013] 1 CLJ 993, Mohamad Ariff Yusof J (later JCA), in allowing an application for a stay of proceedings under s. 10(1) of the 2005 Act, ruled as follows (see pp. 1005, 1006):

> ... the approach in *Fiona Trust* should be followed. Quite apart from the broad reading to be given to linking words such as "in relation to", or "in connection with", or "arising under", the principle that it is to be presumed that rational businessmen would intend to have the same forum decide disputes between themselves in respect of the same broad

A subject matter unless they have expressed otherwise by clear language, has much to commend it, both in terms of legal principle, logic, commercial sense and policy. ... presently I believe it will be better to consider *Fiona Trust* as the starting point for any consideration of the principles of stay of proceeding, in relation to widely-drafted arbitration clauses.

B **[93]** We agree with Mohamad Ariff Yusof J that the approach in *Fiona Trust* should be adopted and followed by our courts in dealing with an application under s. 10(1) of the 2005 Act. It is trite law that the answer to the question as to whether a particular difference or dispute falls within an agreement to arbitrate depends primarily on the proper construction of that agreement in the circumstances of the particular case (see also: *Ashville Investments Ltd v. Elmer Contractors Ltd* [1988] 2 All ER 577).

C

Ancillary Matters: Declaratory Order, Damages And Fraud

[94] The plaintiff argued that an arbitral tribunal had no power or jurisdiction to decide on a claim for declaratory orders, damages for breach of the policy and fraud, as raised in its statement of claim filed in court, and that its claim should be dealt with by the court. With respect that argument cannot not be correct. There are authorities to say otherwise ie that such ancillary reliefs can be dealt with by an arbitral tribunal.

D

[95] On the issue of damages, the English Court of Appeal in *Ashville Investment* (*supra*) ruled at p. 582 that:

E

> ... there is no reason in principle why an arbitrator cannot make an order for the rectification of a contract, provided this is justified at law and by the arbitration agreement, or why he cannot award damages for misrepresentation or a negligent misstatement, subject to the same proviso.

F

[96] On the issue of fraud the English Court of Appeal in *Cunningham-Reid* (*supra*) had given good guidance on this issue. It was held in that case that (see p. 439):

G

> Where a party accused of fraud opposed a stay of proceedings the court would almost invariably refuse a stay, so that the matter could proceed to trial at which the party accused of fraud could have the opportunity to clear his name in open court. However, where the party alleging fraud opposed a stay and the party accused of fraud wished to proceed to arbitration, the allegation of fraud was not by itself sufficient reason for the court to refuse a stay. Instead, the court had a discretion dependent on all the circumstances of the case. Since the parties had agreed, without reservation, that disputes between them should be decided by arbitration and since the plaintiffs' wish to proceed with their action was not sufficient reason to justify refusing a stay, a stay of the plaintiffs' action would be granted so that the matter could be referred to arbitration. The defendant's appeal would therefore be allowed.

H

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[97] The issue of fraud was also touched upon by Bingham LJ in *Asheville Investment* (*supra*), where His Lordship commented at p. 599: "I have no doubt that I would have thought it preferable for any allegation of fraud, if there were one, to be decided by the arbitrator".

[98] Adopting the principle laid down in *Cunningham-Reid* above, the defendant in the present case is "the party accused of fraud", while the plaintiff is "the party alleging fraud". The defendant as the party accused of fraud by filing its application wanted the matter to proceed to arbitration; while the plaintiff as the party alleging fraud, opposed the application. In *Cunningham-Reid* (*supra*), the court had exercised its discretion to stay the proceedings for the matter to be referred to arbitration. It must be noted that in that case the court was relaying on s. 4(1) of the Arbitration Act 1950 (UK) which gives discretion to the court to make such an order staying the proceedings. The court granted the order despite having the discretion not to so grant. However under s. 10 of our 2005 Act, it is mandatory for the court to make such a stay order once the requirements in the section are fulfilled. In our view, the court in the present case has no discretion but to grant stay as applied for by the defendant "as the party accused of fraud".

[99] In *Cunningham-Reid* (*supra*), apart from alleging fraud, the plaintiffs brought the action against the defendant claiming also for:

(i) an account of all monies received by the defendant from the plaintiffs;

(ii) an inquiry as to the balance of the money remaining in the defendant's hands;

(iii) a declaration that the defendant was liable to make good all sums not accounted for; and

(iv) an order that the defendant pay the plaintiffs the amount found due; and

(v) damages.

The Court of Appeal allowed the appeal and reimposed the stay order pending arbitration in favour of the defendant.

[100] The law recognises that declaratory orders as prayed for by the plaintiff in this case can be made by an arbitral tribunal and such orders are valid and enforceable. In *Cunningham-Reid* (*supra*) the prayer for a "declaration that the defendant was liable to make good all sums not accounted for" as claimed by the plaintiff's in that case was allowed to be referred to arbitration. The Court of Appeal of the Supreme Court of Victoria, Australia, in *AED Oil Ltd & Anor v. Puffin FPSO Ltd* [2010] VSCA 37 supported the proposition that an arbitrator can make a declaratory award. In another Australian case, *Electra Air Conditioning BV v. Seeley International Pty Ltd* [2008] FCAFC 169 at (42), (44), the full court of the Federal Court of Australia in recognising that an arbitrator can make an award which contains injunctive or declaratory relief ruled that:

> We think the Model Law gives an arbitrator appointed under that law power to make an order in the nature of an injunction and, if necessary, a declaration.

[101] It is clear from the above authorities that ancillary matters such as fraud, damages, an account of monies received and inquiry as to the balance of monies remaining in the defendant's hand have not been sufficient basis to deny a stay of proceedings pending arbitration. Those authorities clearly show that an arbitrator can decide those matters.

Determination Of Questions Of Law And Fact

[102] The plaintiff also raised an argument that "in the event of a conflict where areas of law are in dispute, it is submitted that the court would be a better forum to adjudicate the matter, notwithstanding the powers or scope of arbitration in general."

[103] With respect we do not agree with that argument. The issues in the present case before us involve questions of facts. The determination of questions of law in this case depend on the determination of the related facts. Therefore, the argument by the plaintiff has no merit and is insufficient to be used to refuse the stay application. The decision of the English Court of Appeal in *Rowe Bros & Co Ltd v. Crossley Bros Ltd* (1912) 108 LT 11, is an authority on this point where it was held that if the question of law cannot be decided without ascertaining a number of facts, a stay will be ordered. (see: 2 *Halsbury's Laws* (4th edn) para. 566 at p. 292).

On Issues Of Saving Time And Costs

[104] The plaintiff also submitted that "if the court decides that the arbitration clause is not applicable and the issues of liability and quantum ought to be determined by the court, both parties will save precious time, legal costs and effort in avoiding arbitration." In our view the issue of time, costs or expenses should not be cited to refuse a stay application. This was affirmed by the English Court of Appeal in *Smith v. Pearl Assurance Co Ltd* [1939] 1 All ER 95, to the effect that the expense of arbitration proceedings is an insufficient ground for refusing a stay.

Clause 4.9(b) – "Court Clause"

[105] The plaintiff also relied on cl. 4.9(b) of the policy certificate which the plaintiff referred to as "the court clause". The clause provides:

> (b) in the event of the Company disclaiming liability in respect of any claim and if an action or suit is not commenced within three months after such disclaimer or (in the case of arbitration taking place in pursuance of Condition 7 of this Certificate) within three months after the arbitrators or umpire have made their award, all benefit under this Certificate in respect of such claim shall be forfeited.

[106] The plaintiff submitted that by virtue of cl. 4.9 (b) above, the plaintiff, as the insured, had to commence an action in court in the event the defendant, as the insurer, disclaimed liability in respect of any claim under the policy, within three months after such disclaimer, failing which, its benefit under the policy in respect of such claim shall be forfeited. The plaintiff further submitted that it was compelled to file the suit in the High Court on 13 February 2015 within the three months period as provided in cl. 4.9(b) to protect its interest, otherwise it would have been unable to dispute the issue of liability and its benefit under the policy would be forfeited. The plaintiff complained that both the High Court and the Court of Appeal did not deal with this clause. The plaintiff further argued that even if there were arbitration clauses binding on both parties, the clauses read together with cl. 4.9 of the policy, allowed the plaintiff to proceed to court when the defendant disclaimed liability; and the clauses ought to be read harmoniously with cl. 4.9.

[107] With respect we cannot agree with the plaintiff on this point. Clause 4.9 talks about "commencement" of an action or suit in court within three months after such disclaimer by the defendant. In other words, the action or suit by the plaintiff must be filed in court within the stipulated time. Section 10(1) of the 2005 Act is only applicable to proceedings which have already been filed in court. An application for a stay of proceedings can only be filed by the defendant after the plaintiff has commenced proceedings in court, but before the defendant takes any other steps in the proceedings. A stay of proceedings means a stay of proceedings which have already been filed in court. So, the appellant's argument on this point clearly does not hold water and ought to be disregarded. In short, cl. 4.9 does not in any way help the plaintiff in its case.

Order 69 r. 10(3) Of The ROC 2012

[108] The plaintiff also raised the issue relating to O. 69 r. 10(3) of the Rules of Court 2012 (the ROC 2012), which reads:

> (3) Where a question arises as to whether:
>
> (a) an arbitration agreement has been concluded; or
>
> (b) the dispute which is the subject matter of the proceeding falls within the terms of such agreement,
>
> the Court may decide that question or give directions to enable it to be decided and may order the proceeding to be stayed pending its decision.

[109] The plaintiff argued that O. 69 r. 10(3) of the ROC 2012 appears to suggest that it is the court that ought to decide whether the subject matter falls within the terms of the arbitration clause and consequently s. 10(1) of the 2005 Act ought to be read together with O. 69 r. 10(3) and dismiss the application for stay.

[110] It must be noted that O. 69 r. 10(3) of the ROC 2012 is a procedural subsidiary legislation while s. 10(1) of the 2005 Act is a substantive provision in an Act of Parliament. Therefore O. 69 r. 10(3) of the ROC 2012 can only be interpreted in a manner which is not inconsistent with the mandatory provisions of s. 10(1) of the 2005 Act. In any event, O. 69 r. 10(1) of the ROC 2012 provides an option for the court either to "decide that question"; or "give direction to enable it to be decided"; and "may order the proceedings to be stayed pending its decision". The mandatory provisions of s. 10(1) of the 2005 Act, must prevail. The matter ought to be stayed pending arbitration if all the necessary requirements under the section are fulfilled. Again, we find that the plaintiff's submission on this point does not hold water and ought to be disregarded.

[111] Another point raised by the plaintiff in this appeal is that the Court of Appeal erred in its decision by relying on para. (b) of s. 10(1) of the 2005 Act which has been repealed *vide* the 2011 Amendment. On this point, we noted that the Court of Appeal had wrongly cited the said para. (b) which has been completely repealed by the 2011 Amendment which came into effect on 1 July 2011. The repealed para. (b) was an exception to the mandatory rule of s. 10(1) whereby the effect is that court shall not make any order to stay the proceedings if "(b) there is in fact no dispute between the parties with regard to the matters to be referred". With the deletion of the said para. (b), the question whether there is any such dispute between the parties need not be considered by the court in granting an order for stay of proceedings. In other words, after the 2011 Amendment, the court shall grant an order for stay whether there exists any dispute between the parties or not. In the present case the High Court in allowing the defendant's application for stay made no mention about this point. However, the Court of Appeal cited the full provisions of the earlier s. 10(1) of the 2005 Act, with the repealed para. (b). It is to be noted that the plaintiff's action in this case was filed at the Kuala Lumpur High Court on 13 February 2014, after the 2011 Amendment. However, we do not find that such an error by the Court of Appeal has any effect on its decision.

Conclusion

[112] For reasons discussed above, it is our finding that there exist valid arbitration clauses as in cls. 4.7 and 4.11 of the policy certificate between the parties and that the defendant, as an insurer had effectively admitted liability to indemnify the plaintiff as the insured, leaving only the issue of amount or quantum to be determined, thus triggering the clauses. There is nothing to show that the agreement between the parties is null and void, inapplicable, inoperative or incapable of being performed.

[113] It is also our finding that the arbitrator has jurisdiction to deal with all the matters specified in the plaintiff's claim which includes the issue of amount or quantum of indemnity to be paid, which may also involve issues

of liability and coverage, and other ancillary matters such as declaratory orders, damages for breach of the policy and fraud committed by the defendant in respect of the issuance of the policy.

[114] We are satisfied that the defendant's application for a stay of proceedings has fulfilled all the requirements under s. 10(1) of the 2005 Act; and that the High Court and the Court of Appeal were correct in granting the stay pending arbitration. We find no valid reason to disturb the concurrent decisions.

[115] In view of our finding that all the matters as claimed by the plaintiff in its statement of claim filed in court are within the scope or ambit of the arbitration clauses in the policy certificate, we find it unnecessary to answer the question of law on which the leave to appeal was granted.

[116] In the upshot, we dismiss the appeal with costs. We affirm the concurrent decisions of the High Court and the Court of Appeal.